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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 46

[redacted]

vs.

[redacted]

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

Petition for certiorari filed [redacted]

Certiorari granted [redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 46

LEO CASSELL, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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IN CRIMINAL DISTRICT COURT NO. 2, OF DALLAS COUNTY, TEXAS

INDICTMENT—Filed November 18, 1947

A True Bill

In the name and by the authority of the State of Texas, The Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 2, of Dallas County, at the October Term, A. D. 1947, of said Court that one Lee Cassell on or about the 22nd day of September in the year of our Lord One Thousand Nine Hundred and 47 with force and arms, in the County and State aforesaid, did with malice aforethought kill Lester Linwood Wilson by hitting, beating and striking him with a piece of pipe; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

(S.) Frank Rigney, Foreman of the Grand Jury.

Will R. Wilson, Jr., Criminal District Attorney of Dallas County, Texas.

[fol. 5] Copy

IN THE CRIMINAL DISTRICT COURT NO. 2, OF DALLAS COUNTY

No. 3900-B

STATE OF TEXAS

VS.

LEE CASSELL

MOTION TO QUASH INDICTMENT

To the Honorable Judge of said Court:

Now comes Lee Cassell, defendant in the above entitled and numbered cause, and moves the court to quash the indictment in this cause, for the following reasons, to-wit:

1

Because the said indictment is vague, ambiguous, not specific and that the offense is not charged in plain and in-

telligible words, sufficient to put defendant upon notice of what he is charged with, and an opportunity to legally defend himself therefrom, and said indictment filed in this cause does not allege a violation of the law.

2

The indictment in this cause should be quashed for the reason that said indictment states and alleges "that one Lee Cassell on or about the 2nd day of September in the year of our Lord One Thousand Nine Hundred and 47 with force and arms, in the County and State aforesaid, did with malice aforethought kill Lester Linwood Wilson by hitting, beating and striking him with a piece of pipe;" that the manner, method or the character of the piece of pipe are not sufficiently described as to furnish this defendant with information of a nature required that he might properly defend himself against the charges and does not allege a violation of the law. Webster's N-w Standard Dictionary defines a pipe as "1. Musical instrument consisting of a long tube. 2. Any long tube. 3. Tube of clay, etc., with a bowl at one end for smoking tobacco. 4. Cask containing about one hundred and twenty-six gallons. 5. Peeping, whistle, or chirping of a bird." There is no definition in the dictionary as to what a piece of pipe would be; and there is no language used in the indictment that would appraise this defendant as to what kind or character of pipe he was charged with using, said indictment does not allege a violation of the law.

[fol. 6] 3

That the allegations in said indictment that Lee Cassell did with malice aforethought kill Lester Linwood Wilson by hitting, beating and "striking him with a piece of pipe" does not allege the kind and character of the weapon or instrument used, and does not aver that it was unknown to the Grand Jury and is therefore an insufficient allegation of the kind and character of the weapon or instrument used in the killing of the said Lester Linwood Wilson and under the constitution of the United States and of Texas and of the penal code of Texas and under the Code of Criminal Procedure of Texas, this defendant is entitled to have this information set out in the indictment against him, that is such a description of the kind and character of the weapon or instrument used, in ordinary and concise language in such a manner as

to enable a person of common understanding to know what is meant, and with that degree of certainty that would give the defendant notice of the particular offense of which he is charged, as set out in Art. 405 of the Code of Criminal Procedure of Texas; and in this connection defendant alleges that he is a person of ordinary understanding, and that he does not understand the meaning of "piece of pipe" as used in the indictment, and that no other person of common understanding would know what is meant; and in this connection he further alleges that no one knows what is meant, not even the most brilliant scholar or learned professor in a university would *not* know what is meant by piece of pipe.

4

That defendant is a negro and is charged with the murder of Lester Linwood Wilson, a white man; that no negroes were placed on the Grand Jury which indicted him, and that there are and were from five thousand to ten thousand adult male negroes, resident citizens of Dallas County, Texas, who are and were qualified jurors, and who were qualified to sit as Grand Jurors, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioners appointed by the court were all white men; that in selecting the grand jury they drew no negroes on said grand jury, and in this connection they discriminated against them in the formation of said grand jury, and thus denied him the equal protection of the law, which is guaranteed him under the Fourteenth Amendment to the Constitution of the United States and the decisions thereunder.

[fol. 7] Wherefore, defendant prays the court that the indictment filed in this cause be quashed, set aside and held of no effect and that the defendant be discharged, and he prays for general relief, and he will ever pray.

(S.) W. E. Pinkston, Attorney for defendant.

203 S W 2nd 206.
186 S W 2nd 243.
189 S W 271.
36 Tex. 352.
Art. 405 C C P.

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77 S W 453 Fourteen Amd.

[fol. 8] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY

[Title omitted]

STATE'S CONTROVERTING AFFIDAVIT TO DEFENDANT'S MOTION TO QUASH INDICTMENT—Filed January 5, 1948

Now comes the State of Texas, acting by and through its duly elected, qualified and acting Criminal District Attorney, and files this, its Controverting Affidavit to Defendant's Motion to Quash the Indictment in the hereinbefore numbered and styled cause;

In paragraph 4 of Defendant's Motion, he alleges that no negroes were placed on the Grand Jury which indicted him and that, in this connection, the white jury commissioners appointed by the Court discriminated against the Defendant in the selection of said Grand Jury and thus denied him the equal protection of the Law.

The State denies that there was any discrimination on the part of the said Grand Jury Commissioners in naming the panel from which members of the Grand Jury which indicted the Defendant were chosen.

The State further claims that nowhere in his Motion does the Defendant show any discrimination which he claims was exercised.

In support of this controverting affidavit, the State would further show that practically all of the Grand Juries which have served in Dallas County, Texas, since the rendering of the Opinion in Hill vs. The State of Texas by the Supreme Court of the United States, have had at least one negro Grand Juror, respectively, on them;

The State of Texas would further show that of the Grand Juries which served during the years 1946 and 1947, there were a total of 108 men on such Grand Juries, of which total five (5) were members of the colored race; further that the Commissioners which selected the Grand [fol. 9] Jury which indicted the Defendant were all instructed by Judge Henry King, Criminal District Court, No. 2, Dallas County, Texas, in which Court the said Grand Jury returned this indictment, that they should exercise no discrimination against any person or group of persons because of race, color, creed or religion; that all of the said Grand Jurors heard and abided by such instruction.

Wherefore, premises considered the State of Texas prays that the Defendant's Motion to quash this indictment in the above styled and numbered cause be overruled in all respects.

Will R. Wilson, Criminal District Attorney, Dallas County, Texas, by (S.) Douglas E. Bergman, First Assistant.

Subscribed and sworn to before me, the undersigned authority, on this, the 5th day of January, A. D. 1948. (S.) Cecil J. Lowrance, Notary Public, Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 10] IN THE CRIMINAL DISTRICT COURT, No. 2, DALLAS COUNTY, TEXAS, JANUARY TERM, 1948

No. 3900-B

THE STATE OF TEXAS

vs.

LEE CASSELL

Statement of Facts

Monday, January 5th, 1948.

APPEARANCES

Hon. Will R. Wilson, Criminal District Attorney, Dallas County, Texas; Hon. Douglas E. Bergman, Hon. Waller M. Collie, Hon. Frank Moore, asst. District Attorneys, for the State of Texas.

Hon. W. E. Pinkston, of Dallas, Texas, for the Defendant.

HEARING ON THE MOTION OF DEFENDANT TO QUASH THE INDICTMENT

Be it remembered, that, upon this, the 5th day of January, A. D. 1948, the Hearing on the Motion of the Defendant to Quash the Indictment in the above entitled and numbered cause came on to be heard before his Honor, Henry King, Judge of said court;

That the following is a full, true and accurate Statement of Facts, in narrative form, of all the facts adduced upon the Hearing on the Motion of the Defendant to Quash the Indictment in the above entitled and numbered cause:

(Reporter's Note: All witnesses sworn and rule invoked.)

[fol. 11] S. TINSLEY CHANDLER, the first witness called by defendant, having been first duly sworn, testified as follows, towit:

Direct examination.

By Mr. Pinkston:

My name is S. Tinsley Chandler; I live in and I am a qualified voter in Dallas County, Texas; I am a married man with no children.

In September, 1947, I was called to the Court House by Judge King to help select a Grand Jury Panel for the October Term, 1947; we met 4 or 5 days ahead of time. Myself and the other men appointed then attempted to appoint a qualified group of men to serve as Grand Jurors for the approaching Term, October Term, 1947. My opinion of what are qualified men for Grand Jury Service is, I tried to select men that were reputable businessmen, or reputable citizens in the community of Dallas County, Texas, and that, in my estimation, were fair and impartial men.

I was acquainted with all of the men that I selected. I did not come down and meet all of the other men that were selected. I never did see them in a group. I believe that I submitted 6 names, all of whom I knew personally. None of them were negroes. I knew at that time that they were not negroes.

Cross-examination.

By Mr. Bergman:

When I was called down to serve as Grand Jury Commissioner, I was instructed by Judge King that there was no racial discrimination, not that a negro could or couldn't be selected for the Grand Jury. The Judge did not tell us that we were to discriminate against negroes or Mexicans or any other race; the Judge did not instruct us to put negroes on or leave them off. Myself and the other 2 Com-

missioners were instructed to select 16 qualified men without reference to race or color or any other question like that.

During the course of our deliberations as Commissioners there was a conversation with reference to selecting negroes on the Grand Jury Panel; it was discussed in the Jury Room along we Commissioners that an effort had been made to secure a negro for the Grand Jury; there was an effort made by the other Grand Jury Commissioners.

[fol. 12] There had been several efforts made to secure negroes and this was discussed among the Members of the Commission. I was not personally acquainted with any negro citizen of Dallas County that I thought was qualified to sit on the Grand Jury, at that time. I did not know a one personally that I would recommend, myself, at that time.

No studied or passive effort was made by that Grand Jury Commission to keep a negro from serving on the October Grand Jury. The reason that I did not submit the name of a negro in my 6 names that I submitted was because I did not know any negro citizen that I felt was qualified with reference to education and business ability to serve on this Grand Jury.

The reason that I did not submit a negro's name was not because of his color, or race, or previous condition of servitude in any sense of the word.

Redirect examination.

By Mr. Pinkston:

I have lived in Dallas 15 or 16 years. After Judge King told me to disregard color or creed, I did disregard it.

(Witness excused.)

A. C. Moser, Jr., the next witness called by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is A. C. Moser, Jr.; I have 5 children; I live in Northeast Dallas; I was born here 38 years ago. I know

many people in Dallas of all races, creeds and colors, etc.

On or about October 1st, 1947, I was called and I came to this court room to serve as a Grand Jury Commissioner to select a Grand Jury for the October, 1947, Term. My duties were to select 12 men and several alternates to serve, and we were given instructions by Judge King not to discriminate in any way against any race, creed or anything of that kind, and that we were to select these men with an open mind. That is what I did.

[fol. 13] I selected 12 men along with the 2 Commissioners; there were not any of us to select any certain number; we were to call men, interview them, and talk to them and, then, we were to get together and select them, the three (3) of us, and that's what we did.

We all selected these men. I interviewed about 5 or 6 and, then, when we came down here to make the list, we rechecked them and in some of the cases the men could not serve. I recommended 5 or 6 men. They were all reputable people, of course, and I checked to see that they had not served previously although that was not something to entirely disqualify them. We did not select a negro; I selected 5 or 6 men and they were all white men, and, in my opinion, qualified to be Grand Jurors.

I know some negroes that might be qualified for Grand Jury Service. I selected a negro but I could not get him for this service because he could not serve. I selected 6 reputable men but I did not select a negro.

Cross-examination.

By Mr. Bergman:

Judge King told us when we were called down here that we should consider negroes as well as anybody else. He told us at least 3 times that we were not to be prejudiced against negroes and he said that it was not our duty to put a negro on, that he was not telling us that we had to and that it was up to us entirely; that applies to Mexicans and Italians as well.

I know negro yardmen, negro doctors, and principals of the negro High School; that is who I tried to get on the jury; I called up the Principal of the Lincoln High School in South Dallas and I asked him if he would serve on the Grand Jury; he said that he would be glad to but that his time belonged

to the City Schools and I was to call his boss, Mr. W. T. White, Superintendent of Dallas Schools; I was unable to get Mr. White when I called him twice because they are very busy in October; finally through his Secretary I was told that he just could not spare his Principals during that time. The Principal of Lincoln High School, Melvin, is a negro. This was just about the beginning of the school year.

There was absolutely no studied or passive effort to [fol. 14] discriminate against negroes on this Grand Jury Panel; they took themselves off when we tried to put them on. The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one; that is the only reason, as far as I was concerned.

The 3 Commissioners submitted 16 names to Judge King and from them 12 names were to be selected; I knew that 12 men would be finally selected.

Redirect examination.

By Mr. Pinkston:

We did not select a negro when I served as a Commissioner; we did disregard ~~color, race or creed~~; I did not know plenty of negroes that I said would be qualified. I know a lot of negroes that are qualified lawyers, doctors, Superintendents of Schools and that sort of thing but the particular thing is that their occupation precludes their serving. You could not ask a doctor or lawyer to serve 3 months of their time, either white or colored; that limited us as to the number that we could select. I knew a lot of white and colored people that were qualified.

I did not select a negro on this Grand Jury Panel but I tried.

(Witness excused.)

B. F. McLain, the next witness called by the Defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is B. F. McLain; I am with the Hart Furniture Company; I reside in Dallas County, Texas, and I am a

qualified voter therein. I am a man of family; I have lived in Dallas 28 years.

I know many people in Dallas that are qualified voters, among all races and creeds. On or about October 1st, 1947, I was appointed a Grand Jury Commissioner to select a Grand Jury for the October, 1947, Term; I acted in that capacity and we selected men for that Grand Jury; I think that I selected 6 or 7 of the 15 or 16 selected. I never did see that Grand Jury in a body.

I did not know practically every one on that Grand Jury; [fol. 15] I knew the ones that I recommended but I did not know everybody on the Grand Jury. I am in the furniture business. All of the 5 or 6 men that I recommended were white men; I personally, did not recommend any negroes.

As far as I know, there was not a negro on the October, 1947, Term of Grand Jury; I have never seen them in a body. When the information came to me I tried to contact a negro; I am sure that I would have known had a negro been put on there. I did not recommend any negroes.

Cross-examination.

By Mr. Wilson:

The Court pointed out to us what the qualifications were for the Grand Jury, he told us to select men who met those qualifications; he told us that we were not to discriminate because of any race, color or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against any one because of race, color or creed. I know definitely and positively that we did not discriminate; we selected the Grand Jury on the basis of qualification and on no other basis. I don't know whether there were any Jews and Catholics on that Grand Jury; I assume that there were some Protestants because I know some of them. The reason a negro was not selected was not because we discriminated; I only appointed those that I personally knew to be qualified.

Mr. Moser tried to contact a negro over the telephone to get him to serve on Grand Jury; as far as I know Mr. Moser did not get the permission to submit the name of that man; I don't remember the negro's name but he was Principal of the Negro High School here. Mr. Moser put this negro's name in and he discussed his qualifications and said that he would recommend him, and Mr. Chandler and I agreed

that we would be agreeable to join with him in his recommendation, if Mr. Moser could procure him.

I found that some people who were qualified could not serve for various reasons; I had one man whose hearing wasn't so good; another man was going to leave town; it is necessary and advisable to get people not only qualified but who can serve. Some people that I approached said, they could not give one-half a day, 5 days a week for 3 months, so, it was necessary to get people that could serve.

If the name of any qualified negro citizen — been sub-
[fol. 16] mitted at that time, who had given his permission and said that he had time to serve, I certainly would have submitted his name along with the other 15 names, if it was somebody that would have been acceptable to me. With reference to there being any studied or obvious or intention-effort made by the Commissioners to keep a negro from serving on the Grand Jury, I will say that there was absolutely no such effort made.

Redirect examination.

By Mr. Pinkston:

All definite selections were made here in the Jury Room and they were submitted from various and sundry names; we discussed them and we made definite selections there; we made the definite selections together there. I did not make any selections or pick out any man for submission before I was appointed. I submitted my names on the date, unknown to me, when the Commission was down here in this court, the day that the Commission got together down here and we made our selection. I had some names and I came in here and discussed them with the other Commissioners.

I cannot give you the exact date when I selected the names that I wanted to submit and recommend for the Commission to appoint as Grand Jurors but I signed this document and that's a date on there; that's when we met and made definite selection. Before that I had asked some people if they would be available; I came down here and met with the other 2 Commissioners on that date and we selected the Grand Jury Panel.

I did not have occasion to submit any names to anybody before I met with the other 2 Commissioners down here; I had some names in mind. The Commission discussed all

names and we, finally, worked out the Grand Jury Panel. We had our lists with us, all of us, and submitted that list during our discussion.

(Witness excused.)

A. C. PARTEE, the next witness called by the Defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

[fol. 17] My name is A. C. Partee; I live in Dallas; I am Executive Secretary of the Progressive Voters' League; in that capacity I maintain a list of the qualified negro voters in the County of Dallas and City of Dallas; I have that list with me.

I have never counted that list; I have approximated the names on that list.

Voir dire examination.

By Mr. Wilson:

I have compiled a list of qualified voters each year here in Dallas County; it is a Poll Tax List of the negro Poll Tax payers. I don't know where this list comes from: it comes out of the office of the Tax Assessor and Collector; I didn't secure it. This list does not have any mark of distinction as between colored and white Poll Tax payers. It is a breakdown of all of the negro voters, taken from the Master Files. The Poll Tax List has the race; generally have "C", or "Brown", "Colored" or "Negro" on there; all that have "C" or "Brown" are taken from that List. Sometimes we pick up a lot of people's names not on the List because whoever made up the Poll List, probably, forgot to fill in the space. This List shows the qualified negro voters for each Precinct. I don't know who got those lists; year before last the List was brought to my office. I keep a record of the number of negro voters in relation to white voters and the total is such and such; I make an attempt to break it down.

I know that my list is accurate as far as the neighborhood of where our people live and work. When we get out of the negro areas, I don't know very much about it; for instance,

there may be a negro living in a Servant's House of your house. I do know about that in Precincts where negroes live because it has the addresses and everything and the house number. I do know a lot of those people personally.

Men and women are al- together on this list, husband, wife, father and son and daughter, whoever lives in the same household; the vote figure that I have is not broken down between men and women. I have no way of know- the percentage between men and women but I would say that it is about 50-50. I am sure that the Tax Collector would, probably, have all of that.

[fol. 18] Direct examination (con'td).

By Mr. Pinkston:

I have checked many of the voters on the list of negro voters in Dallas County that I have. After lists are checked, names counted, etc., I would roughly estimate that the male adult voting strength of the negro race in Dallas County is about 5,500.

Cross-examination.

By Mr. Wilson:

That figure includes both Poll Tax payers and Poll Tax Exemptions both. I am testifying that they are eligible and hold Poll Taxes only, and I know that we have more qualified voters than is on the List here because I have had some personal knowledge of some errors.

With reference to other qualifications entering into Grand Jury service than Poll Tax holders, my testimony is that I estimate that, including Exemptions, there are some 5,500-colored Poll Tax payers in Dallas County.

Redirect examination.

By Mr. Pinkston:

Had a negro been selected on the Grand Jury for October Term, 1948, I would have known about it in about a week's time. I do know of my own knowledge that there are some negroes in Dallas County qualified to serve on the Grand Jury; they were listed among my List of negro voters.

Recross-examination.

By Mr. Wilson:

I know the names of negro men who have served on the Grand Jury; Travis Clark, S. W. Hudson, Jr., W. Barton Beatty, Jr., T. W. Pratt, C. F. Starks. I know Joe Debies, 1315-East 8th Street; I don't know for sure about him having served on Grand Jury; I know of James Dixon, 3405-State Street; that address is colored; I don't recall at the present time that he served on Grand Jury.

Travis Clark is a negro and he served on the Grand Jury; Samuel Hudson is a negro and he served on the Grand Jury. I don't know J. King, of Grand Prairie; I don't know Charles D. Johnson, Carrollton, but I have heard of him; I know he is a negro that served on Grand Jury. I don't know W. J. Sheppard, Mesquite. I do know T. W. Pratt, [fol. 19] 3612-Thomas, who served on Grand Jury. I know C. A. Walton, 3701-Oakland; I have probably forgotten but, probably, he served as Grand Juror. I know that he is a negro.

I don't know about Bonnie Johnson, 4339-Fairfax; I don't know him. I know William M. McShann, from Alpha; he is a negro and I think he served on Grand Jury. I don't know Vernie Flowers, 2607-San Jacinto. I know LaFayette M. Turley, 3608 Allen; he is a negro and he served on Grand Jury. I don't know Milton Grace, 4226-Cabell. I know William Barton Beatty, Jr., a negro, that also served on Grand Jury. I know also Clarence F. Starks, a negro, who served on Grand Jury.

All that I know served on Grand Jury are: C. F. Starks, W. B. Beatty, Jr., S. M. Hudson, Jr., T. W. Pratt, L. M. Turley. I know that those served. Those that I testified to last I know personally; the others I don't know.

Redirect examination.

By Mr. Pinkston:

I did not personally see any of those men on Grand Jury in the Grand Jury Room.

(Witness excused.)

BEN F. GENTLE, the next witness called by the Defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is Ben F. Gentle; I am Tax Assessor & Collector of Dallas County, Texas; my term started October 8th, 1947. I am familiar with the tax records. I do not now have a record of segregated white and colored Poll Tax Holders; they are shown on list as white or colored but I don't have the number as to how many.

There are some Precincts that are practically all negroes.

Cross-examination.

By Mr. Bergman:

I have served on a Grand Jury in Dallas County one 3-[fol. 20] months term; there was a negro on that Grand Jury, January Term, 1946, I believe, I believe that his name was Sam Hudson.

(Witness excused.)

The defendant rests.

MILLARD SWEATT, the first witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is Millard Sweatt; I am a Special Investigator for District Attorney, Dallas County, Texas. I have this date made an investigation of the Grand Jury Records of Dallas County, which are under the control of the District Attorney, with reference to the number of negroes who have served as Grand Jurors for Dallas County since 1942. Those records indicate or reflect the negroes who have served on the various Grand Juries impaneled by the Criminal District Courts of this county since 1942. Negro Grand Jurors have "Colored" behind the names.

From my examination of those records I have prepared a List of the names, addresses and terms of court at which negroes have served on Dallas County Grand Juries since 1942. (Marked State's Exhibit "A"). This List started with October Term, 1942, up through the last term of Grand Jury, 1947.

(Witness excused.)

HENRY KING, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

I am Judge Henry King, Judge, Criminal District Court, [fol. 21] No. 2, Dallas County, Texas, and I have served now 11 years and 5 days.

I tried and I am familiar with the case of Hill vs. The State, which went up from Dallas County around 1942, on the question of negroes not being on Grand Juries. Subject to the opinion of the Supreme Court in 1942, in the Hill Case, with reference to whether I, from my own knowledge, know whether negroes have been on each Grand Jury empaneled in the two (2) Criminal District Courts of this county, subsequent to that time, I will say that, except for a short lapse of time, I was present at every empaneling of the Grand Jury in Dallas County. As you know, we alternate on Grand Juries—Criminal District Court, across the hall, will empanel one Grand Jury and this court, Criminal District Court, No. 2, will empanel the next one, and the Judges sit with each other as a rule, with few possible exceptions, and Judge Grover Adams was on the bench across the hall after I got that opinion and, as I recall, I have been present at every empanelment with the possible exception of about three (3), and that was during the period of the War. I left here in September, 1943, as I recall, and I arrived back here in July, 1944, as I recall.

The Grand Jury had already been picked for the October Term, but I wasn't here for the empanelment of it. Then, I missed the July Term, 1944, and I know, after the Hill Case was returned, I empaneled the next Grand Jury after that,

and I know that there was a negro on that Grand Jury and, as I recall, with the exception of three (3) and not to exceed four (4), to my knowledge, has there been a Grand Jury here that has not had a man of the negro race on the Grand Jury.

One of those Grand Juries was for October Term, 1943; I wasn't here then; and the June Grand Jury of 1944, I wasn't here and, then, I remember, there was one other Grand Jury that didn't have a negro on it; that is the Grand Jury that just went out, October Term, 1947, Grand Jury. As I recall, the Grand Jury before the October Grand Jury, 1947, did not have a negro, so, that would make two (2) that I know definitely that there was no negro on the Grand Jury and two (2) that I don't know about.

At the Grand Jury Term preceding the October Term, 1947, Grand Jury, which indicted this Defendant, two (2) Grand Juries were empaneled, one for each Criminal District Court, for the July, 1947, Term, and I think that there was a negro on one of those two (2) Grand Juries. I am [fol. 22] sure that there was a negro on one of the July Term, 1947, Grand Juries.

Prior and subsequent to the handing down of the opinion in the Hill Case, when I was charging Grand Juries I would tell them that there should not be any discrimination made on account of race, creed or color, or religion, and I particularly instructed them about the Hill Case. As a matter of fact, I explained the Hill Case to them and told them about it.

I gave instructions to the Grand Jury Commissioners that selected the October Term, 1947, Grand Jury that indicted this Defendant, both individually and collectively, with reference to negroes serving on that Grand Jury.

Cross-examination.

By Mr. Pinkston:

There was not a negro on the October, 1947, Term Grand Jury that indicted this Defendant. I don't know that the Commissioners disregarded my instructions but they didn't put a negro on. The Commission did not fail to put a negro on that Grand Jury after my specific instructions; I never have instructed any Grand Jury Commission to put any negro on a Grand Jury, or a Catholic, or any religion, or a person of any nationality, even though they were American citizens; I have never instructed them to put anybody on there any more than never to tell them to put "John Doe"

on there; but I have told them what the case held in the Hill Case; I have always told them what the Constitution says with reference to discrimination against a person because of race, politics, religion or color. It is not my duty to tell them to put them on or not to put them on.

With reference to your wanting it in the record that, after my instructions, they failed and refused to put a negro on, I will say, I cannot answer that; I wouldn't say that they refused. I will answer that they didn't put one on there; there wasn't one on there, after I had instructed them what their duties were with reference to discrimination.

(Witness excused.)

[fol. 23] MILLARD SWEATT, the next witness, recalled by The State of Texas, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

These are the Grand Jury Docket Books; No. 1 is for 1941 on through 1943 and 1944; Book No. 2 is 1944 through 1946; No. 3 Book is to begin at December, 1946 and also reads "1947 through 1949". On page 445, Grand Jury Book, 1941 through 1944, there is a list of the January Term, 1943, Grand Jury; it shows that Charles D. Johnson, a negro, served on Grand Jury, from Carrollton, Route 1. On page 491 of same book, April Term, 1943, Grand Jury appears; it shows that W. J. Sheppard, Route 3, Box 14, Mesquite, Texas, a negro, was on the Grand Jury for that term.

In this same book, page 531, there appears the Grand Jurors for July Term, 1943, which include a negro citizen, T. W. Pratt, 3612—Thomas. On page 617, same book, there appear Grand Jurors for January Term, 1944, including C. A. Walton, a colored man, 3711—Oakland Avenue.

In this book, 1944 through 1946, I find list of Grand Jurors for April Term, 1944, page 33, including Bonnie Johnson, colored, 4339—Fairfax.

On page 83, same book, I find the list of Grand Jurors for July Term, 1944, including William McShann, colored, of Alpha, Texas.

On page 139 of this book, I find list of Grand Jurors, October Term, 1944, which includes Vernie Flowers, 2607—San Jacinto.

On page 186 of this book, I find list of Grand Jurors, January Term, 1945, which include the name of LaFayette M. Turley, colored, 2638—Allen Street.

On page 247 of this book, I find list of Grand Jurors for April, 1945, Term, which includes Milton Grace, colored, 4226—Cabell, Dallas.

On Page 308 of this book, I find list of Grand Jurors for July 1945, Term, which includes William Barton Beatty, Jr., colored, 3512—Myers, Dallas.

On Page 379 of this book, I find list of Grand Jurors for October 1945 Term; it shows Clarence F. Starks, colored, 2431—Caddo St., Dallas.

On page 426 of this book, I find list of Grand Jurors for [fol. 24] January 1946 Term, which includes Wheeler Hardaway, colored, 3810—Weiner, Dallas.

On Page for July term, 1946, Grand Jurors in this book I find the name of Joe Dedies, page 563; this man lives in a colored district on East 8th Street, known to be a colored part of City of Dallas.

On Page 1 of this (indicating book, 1947 through 1949, I find a list of Grand Jurors for October Term, 1946; the name of James Dixon, colored, 3405—State Street, appears thereon.

On Page 54 of this book I find a list of the Grand Jurors for the January Term, 1947, among whom is Travis Clark, colored, 1809—Washington, Dallas.

On Page 182 in this book I find the names of the Grand Jurors for the July Term, 1947, which includes the name of Sam Hudson, Jr., colored.

Cross-examination.

By Mr. Pinkston:

I have been employed by the District Attorney since May, 1947; I do office work and outside investigating work. I did not write in these Grand Jury records here at all; somebody else has custody of these books; they are accessible to any one wanting to check them in Grand Jury Room; somebody else writes in these books and the employees of District Attorney's Office are Custodian thereof. I did not see them written in here.

Of my own knowledge, I couldn't say why a word or something was put opposite somebody's name; I didn't see that put there and I don't know who put it there except that it

was put there for the express purpose of showing that they were colored people. I don't know what was in somebody else's mind.

(Witness excused.)

WILL R. WILSON, JR., the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is Will R. Wilson, Jr.; I am the present District [fol. 25] Attorney, Dallas County, Texas; I took office January 1st, 1947.

I have heard Mr. Sweatt's testimony; those books are the records of the Dallas County Grand Jury containing a list of the people serving on the Grand Juries for each of those Terms and a record of the cases heard by the Grand Jury, showing the name of the Defendant, the offense with which he is charged, the date of the hearing and the action of Grand Jury. These are a record of my office and they are kept under my supervision and they are kept by an employee of my office.

The books covering the period from 1943 to 1946, inclusive, were turned over to me by Dean Gauldin when I assumed office, January 1st, 1947; that is the identical book which was turned over to me at that time. The book designated as Grand Jury Docket Book 1944-1946 is a record of the Grand Jury as turned over to me by Dean Gauldin, my predecessor, when I took office January 1st, 1947. This book identified as Grand Jury Docket Book for years, 1947 through 1949 and October and December, 1946, with the exception of those entries in that book which appear to have been made for October to December period in 1946, those other entries have been made by my employees under my supervision and control.

Cross-examination.

By Mr. Pinkston:

I did not personally make any entries in these books; my agents and employees in my office made them all. I don't

know who made the entries under former administration. Those, like other records, were all delivered to me when I took office and I then assumed custody of them. I don't know who made them. I had no supervision over any of those records before I took office; I had nothing whatsoever to do with these records before January 1st, 1947.

I have been in the Grand Jury Room when entries were being made in these books for 1947 record; I have seen the employee of my office working on them. I could not testify as to any independent entry.

Redirect examination.

By Mr. Bergman:

These are the official records of the Dallas County Grand Juries for the years indicated on the back; they are books of original entry. With the exception of the Bills of Indict-
[fol. 26] ment, these are the only records of the Dallas County Grand Juries for the years indicated; outside of the stenographic records of Grand Jury proceedings, these are the only records.

There have been negroes empaneled on the Grand Juries since I assumed office January 1st, 1947, as District Attorney; I can't say how many; I can say that I have appeared before all of the Grand Juries since that time and that I have independent knowledge and recollection of the fact that there was a negro on the January, 1947, and the Summer, 1947, Grand Juries. I have been before all of the Grand Juries and I have seen negroes on the January and July, 1947, Term Grand Juries.

Recross-examination.

By Mr. Pinkston:

I am not in the Grand Jury Room often, only when I go on some special matter. I occasionally visit with the Grand Juries in the routine operation of their business.

My testimony is that I have been before all of the Grand Juries and that I have independent recollection of negroes being on two (2) of them. I don't remember whether there were negroes on the others or not.

(Witness excused.)

The State rests.

Defendant closes.

(Reporter's Note: Case reopened by The State of Texas.)

BILLY G. BURDEN, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is Billy G. Burden; I am Clerk of Criminal District Court, No. 2, Dallas County, Texas.

[fol. 27] I have a record of the Minutes of the court showing the names of Grand Jurors empaneled for the October Term, 1942, until October Term, 1947, Grand Juries. For October Term, 1942, the name of J. King appears as a member of Grand Jury for October Term, 1942. For January, 1943, Term the name of Charles D. Johnson appears. These are official records of the District Clerk of Dallas County, Texas, and they are kept by me.

The records of January, 1943, Term Grand Jury are in the other court which are in that (indicating) stack; (witness looks) Yes; it appears therein. My testimony is based on the records of both Criminal District Court and Criminal District Court, No. 2, Dallas County, Texas. These are the Official Minutes.

W. J. Sheppard appears in the Minutes for April, 1943, Term; the name of T. W. Pratt appears as a member of the July, 1943, Term Grand Jury; the name of C. A. Walton appears as a member of the January, 1944, Term, Grand Jury; the name of Bonnie Johnson appears as a member of the April Term, 1944, Grand Jury; the name of William McShann appears as a member of the July Term, 1944, Grand Jury; the name of Vernie Flowers appears as a member of the October, 1944, Grand Jury; the name of LaFayette M. Turley appears as a member of the January, 1945, Grand Jury; the name of Milton Grace appears as a member of the April Term, 1945, Grand Jury; the name of W. Barton Beatty, Jr., appears as a member of the July Term, 1945, Grand Jury; the name of Clarence F. Starks appears as a member of the October Term, 1945, Grand Jury; the name of Wheeler Hardaway appears as a member of the January, 1946, Grand Jury; the name of Joe Dedies appears as a member of the July, 1946, Term of the Grand

Jury; the name of James Dixon appears as a member of the October, 1946, Term Grand Jury; the name of Travis Clark appears as a member of the January, 1947, Term of Grand Jury; the name of William Hudson, Jr., appears as a member of the July, 1947, Term of Grand Jury; it is as Samuel Hudson.

I have been testifying from the Minutes of the two (2) Criminal Districts Courts of Dallas County, Texas, which records are under my control and supervision as Deputy District Clerk.

Cross-examination.

By Mr. Pinkston:

I have been in present position since January 1st, 1947; [fol. 28] I am not wholly the custodian of the records of Criminal District Court; there is another party who has charge of them; I have seen some of his records made.

I do not have custody of the books across the hall in Criminal District Court, Dallas County, Texas, but I have the authority to handle records in both of these courts. I am custodian of the records of both courts; the Clerk across the hall prepares the records; he has jurisdiction; that Clerk is equally Custodian of the records in both courts. He does not prepare records of this court and I don't prepare records in the other court; he works in that court and I work in this court; our jobs are similar.

(Witness excused.)

M. L. Miller, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is M. L. Miller; at this time I practice law in Dallas; I was connected with the District Attorney's office from January 1st, 1941, until January 1st, 1947, with the exception that in the summer of 1946 I resigned to make a race for County Commissioner; I was out for 3-months.

In 1942 I was assigned to the Grand Jury as Investigator and so served; later on I worked with the Grand Jury in a

dual capacity, handling Grand Jury as Assistant and working with them as an Investigator. During the time from October, 1942, until January 1, 1947, with the exception of those 3-months, I was connected with the Grand Juries of Dallas County in some capacity.

I know John King, Grand Prairie, Texas; he is a negro and he served on the October, 1942 grand jury. I know Charles D. Johnson of Carrollton, Texas; he is a negro and he served as a member of the Grand Jury while I was over there.

I know A. J. Sheppard of Mesquite, Texas; he is of the [fol. 29] negro race and he served on Dallas County Grand Jury for whatever term the record there shows. I know T. W. Pratt; he is of the negro race; he served on a Grand Jury during my tenure of office for whatever date the record shows. I know C. A. Walton, Dallas; he is of the negro race and he served on Grand Jury for whatever term the records indicate; I know Bonnie Johnson, Dallas, Texas; he is of the negro race and he served on Grand Jury during my tenure, whatever term the records indicate. I know William McShann; he is of the negro race and he served on Grand Jury of Dallas County for whatever term the records indicate. I also know Vernie Flowers, Dallas, Texas; he is of the negro race and he served on Grand Jury for whatever term the records indicate. I know LaFayette M. Turley; he is of the negro race and he served on a Grand Jury for whatever term the records indicate. I know Milton Grace, of Dallas, Texas; he is of the negro race and he served on a Dallas County Grand Jury for whatever term the records indicate. I know W. Barton Beatty, Junior, of Dallas, Texas; he is of the negro race and he served on a Dallas County Grand jury for whatever term the records indicate. I know Clarence F. Starks; he is of the negro race and he served on a Dallas County Grand Jury for whatever term the records indicate. I know Wheeler Hardaway, Dallas; he is of the negro race and he served on a Dallas County Grand Jury for whatever term the records indicate.

I do not recall Joe Dedies. I understand that he was on the Grand Jury for the last term of Mr. Gauldin's term but I did not serve with the Grand Jury for that term. I do know of my own knowledge that he did serve during the October Term, 1946, but I wouldn't know him to be a negro.

I do not know Travis Clark; I don't know whether he served as a Grand Juror in 1947; I am not familiar with what happened in 1947.

Cross-examination.

By Mr. Pinkston:

In the first 4 years with Mr. Gauldin, I served in the capacity of an Investigator, assigned to the Grand Jury; my duty was to be in the Grand Jury and in the District Courts; I was in the Grand Jury practically every minute unless I was in some major case here in one of the District Courts; that is between 1942 and 1947, with the exception of the 3-months I was out.

[fol. 30] As I recall, John King was the first negro placed on a Grand Jury after the Allen Hill case, and I believe that the records will show that to be October Term, 1942. I don't recall knowing another John King offhand.

I was in and out of Grand Jury some days 3 or 4-times during the morning. During whole term I would say that I would miss very few days being with Grand Jury some part of the morning; I was in there to testify only when it was necessary in some case.

I have known this John King for quite some time, I knew him before that; he lives out North of Grand Prairie at Bear Creek.

Outside of that Charles D. Johnson you mention I only know a youngster by that name. I can visualize that Charles Johnson in my mind, the one from Carrollton; I have lived near Carrollton but I did not know him out there or previous to his time on the Grand Jury. I remember that man Johnson from Carrollton; I am positive in my mind that he is a negro.

I know quite a few Sheppards, white and black; I can be positive that W. J. Sheppard is a negro; I saw T. W. Pratt in the Grand Jury room many times and I am positive that he is a negro. I know C. A. Walton; I possibly had seen him before 1943 but I did not know him, personally; I am positive that he served on Dallas County Grand Jury in 1944.

I met Bonnie Johnson after he came on the Grand Jury; I am positive that he is a negro. I knew William M. McShann as McShane; I met him after he came on the Grand

Jury; he is from Alpha, Texas. I am positive that he is a negro.

I knew Vernie Flowers on San Jacinto Street but I did not know him personally until he came on Grand Jury; I do know that he is a negro. I met LaFayette M. Turley; I was accused of knowing him previous to the time that he got on Grand Jury but I didn't know him; I didn't recognize him; I was supposed to have known him a long time ago. I am sure that he was a negro.

I did not know Milton Grace previous to the time that he served on the Grand Jury; I know that he is a negro; I know W. Barton Beatty Jr., and I saw him on Grand Jury; I did not know him before that; I am sure that he is a negro.

[fol. 31] I do not recall having known Clarence F. Starks before 1945 when he served on Grand Jury; he is a negro.

(Witness excused.)

The state closes.

Rebuttal.

David Murphy, the first witness called by The Defendant on Rebuttal, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is Dave Murphy; I am assigned as Clerk of the Criminal District Court, Dallas County, Texas, by District Clerk, Dallas County, Texas. The books of that court are in my custody; I make the records and I have charge of them at all times. My books are kept in a combination locked vault; Billy Burden and I both have that combination. I make the entries and I have charge of the records of Criminal District Court, Dallas County, Texas.

Cross-examination.

By Mr. Collie:

Billy Burden and myself have concurrent jurisdiction over each other's office in these 2-courts. He comes over and assists me with my records and I do the same for him;

we work directly across from each other and we work concurrently; he and I work and have custody of the records in each court; we do not have keys to the other's office but we have both combinations. I have access to his office any time that I want to get in.

Re-direct examination.

By Mr. Pinkston:

I am assigned to a particular court and that is Criminal District Court, Dallas County, Texas. Billy Burden is [fol. 32] assigned to Criminal District Court No. 2, Dallas County, Texas.

Re-cross-examination.

By Mr. Bergman:

I was in court when Billy Burden testified about these records a few minutes ago, the records being with reference to empaneling Grand Juries since 1942 in Criminal District Court, the Minutes. Those books that Mr. Burden removed from Criminal District Court and brought over here are the Official Minutes, Criminal District Court, Dallas County. I prepared those books for Mr. Burden a few minutes ago when he testified from them; those are true records of my court and they are kept under my supervision and control over there.

Re-direct examination.

By Mr. Pinkston:

The District Clerk, Dallas County, Texas, is responsible for any of these books being lost. He is also responsible for all of the Clerks like me that work for him.

My duties are to keep the records of Criminal District Court, Dallas County, Texas.

(Witness excused.)

The defendant rests.

The state rests.

The defendant closes.

The state closes.

Testimony closed.

[fol. 33] REPORTER'S CERTIFICATE

I, Jack K. Tingle, Official Court Reporter in and for Criminal District Court, No. 2, Dallas County, Texas, do hereby certify that the foregoing 25-pages, numbered 1 to 25, inclusive, contain a full, true and accurate Statement of Facts, in narrative form, covering all of the facts adduced upon the Hearing of the Defendant's Motion to Quash the Indictment in the above entitled and numbered cause.

Witness my hand this 23rd day of March, A. D. 1948.

(Sgd.) Jack H. Tingle, Official Court Reporter, Criminal District Court, No. 2, Dallas County, Texas.

AGREEMENT OF COUNSEL

We, the attorneys-of-record for the State of Texas and the defendant, respectively, hereby agree that the above and foregoing 25-pages contain and constitute a full, true and correct Statement of Facts in said cause.

Witness our hands, this the 3rd day of June, 1948.

Will R. Wilson, Jr., Criminal District Attorney, Dallas County, Texas. (Sgd.) Douglas E. Bergman, (Sgd.) Waller M. Collie, Jr., Asst. District Attorneys. (Sgd.) W. E. Pinkston, Attorney for Defendant.

ORDER APPROVING STATEMENT OF FACTS

The above and foregoing Statement of Facts, certified to by the Official Court Reporter and agreed to by the attorneys-of-record for the State of Texas and the Defendant, having been presented to me, same is examined, approved and ordered filed as the Statement of Facts in this cause.

This, the 3rd day of June, A. D. 1948.

(Sgd.) Henry King, Judge, Criminal District Court, No. 2, Dallas County, Texas.

[fol. 34] IN COURT OF CRIMINAL APPEALS OF TEXAS

No. 24158

CASSELL

v.

STATE

OPINION—December 8, 1948

KRUEGER, Judge.

The offense is murder. The punishment assessed is death. • • •

The evidence adduced by the state, briefly stated, shows that appellant and Eddie Hamilton killed Lester Linwood Wilson with a piece of iron pipe while burglarizing the "Sportsmen's Center," a store owned and operated by one James M. Brooks.

• • • Appellant filed a motion to quash the indictment. • • •

His next complaint in his motion to quash the indictment is based on the ground of race discrimination practiced by the jury commissioners who selected the grand jury which returned the indictment herein against him. He charged that he was a Negro; that the deceased was a white man; that no Negro was selected by the jury commissioners as a grand juror; that there were from five to ten thousand adult male Negroes, resident citizens of Dallas County, Texas, who were qualified for grand jury service, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioner who selected the grand jury were white men; that they selected no Negro to serve on the grand jury; that in doing so they discriminated against the Negro race, and thus denied him the equal protection of the law guaranteed him under the 14th Amendment to the Constitution of the United States.

The trial court heard evidence relative to the allegations of race discrimination. Appellant called as witnesses the three jury commissioners to support the allegations in his motion. Each one of the jury commissioners testified in substance that they did not discriminate against the Negro race in the selection of grand jurors; that they sought to select fair and impartial men who were qualified for grand

jury service; that they were instructed by Judge King not to discriminate in any way against any race or creed; that he did not tell them that they had a put a Negro on the grand jury; that it was up to them; that it applied to Mexicans and Italians as well. One of the members of the jury commission contacted the principal of the Negro high school, who is a Negro, but he said that he could not serve—that his time belonged to the city schools; that he knew Negro doctors, school teachers, and lawyers, but no one could hardly expect them to neglect their professional duties to their patients and clients to serve for a period of three months on a grand jury. He further testified that before they selected any grand jurors, they contacted men who they knew were qualified to ascertain if they could and would serve. Although there was no Negro selected by them for grand jury service, there was no intentional discrimination by them against the Negro race.

Appellant next called A. C. Partee, who testified that he lived in Dallas County; that he is Executive Secretary of the Progressive Voters' League; that in that capacity he maintained a list of qualified Negro voters in Dallas County; that he would estimate that the adult male voting strength of the Negro race in Dallas County is about five thousand five hundred; that figure includes both poll taxpayers and poll tax exemptions; that if a Negro had been selected as a grand juror for the October Term, he would have known about it; that he knew the names of some Negroes who have served on grand juries, to-wit: Travis Clark, S. W. Hudson, Jr., W. Barton Beatty, Jr., T. W. Pratt, C. F. Stark, and L. M. Turley. The record further discloses that since the year 1943, Negroes were selected as and served as grand jurors at each and every term of court up to October, 1947, when this indictment was returned. It occurs to us that an issue of fact was raised by the evidence which the court, in the exercise of his discretion, determined adversely to appellant, and the court's determination of the issue is binding on this court as much so as if the issue had been decided by a jury. We think that the court was justified in overruling the motion to quash the indictment unless it can be said that a failure to select one [fol. 35] one or more Negroes for grand jury service at each and every term of court when a grand jury is impaneled is in and of itself conclusive evidence of race discrimi-

nation, notwithstanding the fact that Negroes were selected for grand jury service at every preceding term of court for a number of consecutive years. We have not found any case in which a court has held that it is imperative that one or more Negroes be selected on each and every grand jury in order to comply with the equal protection of the law. * * *

IN COURT OF CRIMINAL APPEALS OF TEXAS

OPINION ON APPELLANT'S MOTION FOR REHEARING—January 19, 1949

DAVIDSON, Judge:

Appellant insists that we erred in reaching the conclusion that the record did not reflect discrimination against members of the Negro race in the selection and impaneling of the grand jury which returned the indictment in this case. He insists that he is supported in his contention by the decisions of the Supreme Court of the United States and especially those of Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, and Hill v. Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559.

We are familiar with the holding in those cases, as the decision of this court was reversed in each case. We are perfectly willing to follow the holding in those cases and will not hesitate to do so when thought controlling. But we cannot bring ourselves to that conclusion in this case.

It is our opinion that the case of Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692, by the Supreme Court of the United States, sustains the conclusion reached in our original opinion.

In the cases involving the question of race discrimination in the organization of grand juries, we must not lose sight of the fact that the sole and only question involved is a determination as to whether race discrimination was practiced. It is not a question as to whether a member of the Negro race should or should not have been drawn and impaneled on the grand jury. Nor is it a question as to the inequality in the numbers who serve or a comparison, upon a percentage basis of population, between the white and Negro citizens who are eligible for grand jury service. No person has the right to say that a member of his race shall

be impaneled on the grand jury. Nor does proof, merely, that a member of the Negro race is not impaneled upon the grand jury establish that discrimination has been practiced against members of that race, in the organization of the grand jury.

Such is our understanding of the holding in the Akins case, supra, not only in the majority but also in the dissenting opinion.

Dallas County, where this prosecution was maintained, has two district courts having jurisdiction in criminal cases. Each of these courts impanels two grand juries each year. Grand juries are impaneled in January, April, July and October of each year.

The instant record deals with grand juries impaneled beginning with the October term, 1942, and through the October term, 1947, at which term the instant indictment was returned. This period of time accounts for twenty-one consecutive grand juries in Dallas County. A member of the Negro race was upon each of those grand juries, save and except October, 1943, April and October of 1946, and April and October, 1947.

The record does not reflect the number of Negroes summoned for grand jury service and not impaneled on the grand jury during that period of time; nor is it shown that on those grand juries upon which no member of the Negro race actually served, no Negro was summoned for grand jury service at those terms and excused by the court.

Under the statute law of this State, sixteen men are summoned for grand jury service, from which the grand jury of twelve are selected. Art. 338, C. C. P.

Proof, merely, that a member of the Negro race did not serve on the grand jury by no means establishes that no member of that race was not selected by the jury commissioners to do grand jury service.

[fol. 36] Under the facts mentioned, we cannot bring ourselves to the conclusion that this case comes within the rule announced by the Supreme Court of the United States that the systematic exclusion of Negroes from grand jury service evidences race discrimination. Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074.

The record before us reflects that there were 5,500 Negroes in Dallas County qualified to vote. But the qualification to vote is but one of the qualifications for grand jurors. Art.

339, C. C. P. It could hardly be said, then, that this record reflects there were 5,500 Negroes in Dallas County qualified for grand jury service.

Viewing this record as a whole, we can arrive at but one conclusion and that is that since the decision of the Supreme Court of the United States in the Hill case, supra, the officers of Dallas County have earnestly endeavored to comply therewith and to do no act whereby it could be said that members of the Negro race had been discriminated against in the organization of the grand juries. Indeed, the district judges had endeavored to impress upon the jury commissioners that fact, and had done about everything a judge could do to effect that end, save and except to instruct the jury commissioners to select members of the Negro race for grand jury service, which instruction, if given, would be contrary to law.

The jury commissioners, who drew the list of grand jurors from which the grand jury that returned the indictment against appellant, appear to have contacted members of the Negro race who they thought possessed the qualifications of grand jurors, with a view of having them serve on the grand jury, and refrained from placing them on the grand jury, at their request. While it is true the jury commissioners were not clothed with the authority to pass upon excuses of those eligible for grand jury service, yet it appears to us that this conduct on the part of the jury commissioners fortifies and supports them in their position that they did not discriminate against members of the Negro race in drawing the grand jury that returned the instant indictment.

Believing that appellant has failed to show race discrimination in the organization of the grand jury, as alleged, his motion for rehearing is overruled.

* * * * *

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—April 4, 1949

On Consideration of the motion for leave to proceed herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 4, 1949

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted, and the case is placed on the summary docket. The case is transferred to the appellate docket as No. 692.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 39] THE SUPREME COURT OF THE UNITED STATES

STIPULATION COVERING CONTENTS OF RECORD—Filed September 2, 1949

Now Come Lee Cassell, petitioner in the above styled matter, and likewise comes the State of Texas, by and through their undersigned attorneys, and hereby stipulate that the Transcript of Record in this cause shall contain the hereinafter described documents and proceedings, which are attached hereto and accurately reflect said documents and proceedings, the date of filing thereof and the date of the occurrence thereof, which transcript of record as so constituted accurately reflects all proceedings in the Criminal District Court No. 2 of Dallas County, Texas, and in the Court of Criminal Appeals of the State of Texas pertaining to the issues presented by the Petition for Certiorari:

Pages

1. The opinion of the Court of Criminal Appeals on both original submission and motion for rehearing . .
2. The indictment filed November 18, 1947 . . . . . .
3. The petitioner's motion to quash the indictment
4. The controverting affidavit to the motion to quash the indictment filed by the State of Texas . . .
5. The statement of facts containing all the testimony adduced in connection with the motion to quash and the controverting affidavit thereto, after the submission of which testimony and the argument of counsel thereon the Judge of the Criminal District Court No. 2 of Dallas County, Texas overruled the motion to quash and defendant excepted . . . . . .

This stipulation is signed by the parties and filed in the Supreme Court of the United States, together with the attached copies as indicated, to constitute the entire Transcript of Record in said cause, but without prejudice to the rights of the parties by supplemental stipulation or motion under the rules of the Court to bring forward such additional parts of the record as may hereafter appear to either of them to become material to the proceedings in The Supreme Court.

Done at Houston, Texas, this — day of August, 1949.

Lee Cassell, Petitioner, by Chris Dixie, Attorney of Record; State of Texas, by Price Daniel, Attorney General of Texas, by Joe R. Greenbelt, First Assistant Attorney General of Texas, Attorneys of Record.

[fol. 40] [File endorsement omitted.]

Endorsed on Cover: In forma pauperis. Enter Petitioner pro se. File No. 53,694. Texas, Court of Criminal Appeals. Term No. 46. Leo Cassell, Petitioner, vs. The State of Texas. Petition for writ of certiorari and exhibit thereto. Filed February 18, 1949. Term No. 46 O. T. 1949.